No. 87-967

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AUDREY PRICE, NAILA KURDI, SHARON ATRA, EUGENE STERN, and PATRICIA MARQUARDT, individually and on behalf of all others similarly situated, and HOPE FAIR HOUSING CENTER,

Petitioners,

v.

SAMUEL PIERCE, in his official capacity as Secretary of the United States Department of Housing and Urban Development; A.D. VAN METER, in his official capacity as Chairman of the Illinois Housing Development Authority; JAMES KILEY, in his official capacity as Director of the Illinois Housing Development Authority; HAWTHORN RIDGE ASSOCIATES; VERNON HILLS ASSOCIATES II; TRAILS VENTURE; GRANDWOOD GARDENS ASSOCIATES; PRAIRIEBROOK VENTURE; and ARROWHEAD APARTMENT ASSOCIATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS A.D. VAN METER'S AND JAMES KILEY'S BRIEF IN OPPOSITION

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14 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:	PAGE
Cedar-Riverside Associates, Inc. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979)	8
Edison v. Pierce, 745 F.2d 453 (7th Cir. 1984)	2
Ferguson v. Skrupa, 372 U.S. 726 (1963)	8
Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981)	4, 9
Price v. Pierce, 821 F.2d 1114 (7th Cir. 1987)	*passim*
Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982)	7
STATUTES:	
26 U.S.C. § 103	10
26 U.S.C. § 142	10
42 U.S.C. § 1437	8

42 U.S.C. § 1437f 2, 3, 4

42 U.S.C. § 1441 8

Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 325, 371, 95 Stat. 357, 406, 431 (1981) . 3, 6

Supplemental Appropriations Act of 1984, Pub. L. No. 98-181, Title II, § 209(a)(2), 97 Stat. 1153, 1183 (1984) 3, 7

Tax Reform Act of 1986, Pub. L. No. 99-514, § 1311(a), 100 Stat. 2659 (1986) 10

Supreme Court Rule 17.1 6

Ill. Rev. Stat. Ch. 67½, ¶ 301 *et seq.* 2

LEGISLATIVE HISTORY:

H.R. Rep. No. 1114, 93rd Cong., 2d Sess. 1, 22-24 (1974) 8

S. Rep. No. 693, 93rd Cong., 2d Sess. 1, 44 (1974) . 9

TREATISES:

Restatement (Second) of Contract, § 302 (1979) 9

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Respondents A.D. Van Meter and James Kiley respectfully request that this Court deny plaintiffs' petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT OF THE CASE

The Illinois Housing Development Authority ("IHDA") was created for the purpose of increasing the production of housing for persons of low and moderate income in Illinois. *Ill. Rev. Stat.* ch. 67½, ¶ 301 *et seq.* Respondents A.D. Van Meter and James Kiley are the Chairman and Director of IHDA. IHDA, through tax-exempt bonds, provides loans to not-for-profit and limited-profit entities for the construction or rehabilitation of housing developments. *Id.*

Section 8 provides that the Secretary of Housing and Urban Development ("HUD") is authorized to enter into annual contributions contracts with a public housing agency, like IHDA. 42 U.S.C. § 1437f. Pursuant to the annual contribution contracts, IHDA enters into contracts to make housing assistance payments to owners of apartment complexes to assist eligible low income tenants in renting units. 42 U.S.C. § 1437f(b)(1). (These contracts are collectively referred to herein as "Section 8 contracts.") One of the goals of the Section 8 program is to enable, to the extent feasible, low income tenants to live in economically mixed multifamily housing. The federal government, through IHDA, provides a rental subsidy by paying the owner the difference between a fair market rent and the amount the low income tenants can afford. *Edison v. Pierce*, 745 F.2d 453, 454 (7th Cir. 1984).

Until 1981, Congress refused to impose a requirement that all available Section 8 subsidies be utilized. In 1981, well after all the Section 8 contracts involved in this case were executed, Section 8 was amended to require new Section 8 contracts to provide for full utilization of avail-

able Section 8 subsidies. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 325, 371, 95 Stat. 357, 406, 431 (1981). Because this amendment only applies to Section 8 contracts entered into after October 1, 1981, it does not apply to the Section 8 contracts at issue in this case.

On November 30, 1983, Congress abolished the portion of the Section 8 program at issue here by repealing 42 U.S.C. § 1437f(b)(2). Supplemental Appropriations Act of 1984, Pub. L. No. 98-181, Title II, § 209(a)(2), 97 Stat. 1153, 1183 (1984). Consequently, no new Section 8 projects of the type at issue in this case have been funded since then.

Pursuant to the Section 8 program, between 1975 and 1978, IHDA, HUD, and several developers entered into Section 8 contracts to provide funds for low income tenants at six housing developments. These Section 8 contracts set forth the maximum number of subsidized units for which Section 8 funds can be obtained for each development. (*See* App. 161-162, 170-171.) The owners of these developments only receive payments from the government for the Section 8 units that are actually utilized. (App. at 2); 42 U.S.C. § 1437f(c)(4).

When the Section 8 contracts at issue here were executed, Section 8 was a new federal program. While one of the goals of the Section 8 program was, to the extent possible, to construct multifamily housing with a mix of low income and market rate tenants, "no one knew what the optimum mixture was." (App. at 12.) Determining the proper mix of low income and market rate tenants was key because "[i]f the percentage of poor people in a project rises too far, the other tenants may leave, and the purpose of the program would be defeated." (*Id.* at 13-14.)

In addition, without enough market rate tenants renting units, the project could be without sufficient income to meet expenses, resulting in a collapse of the housing development. (*Id.* at 14.)

The Section 8 subsidies originally set aside for each of the six developments was for a maximum of 40% of the units in each development. (*Id.* at 2.) Until approximately August of 1983, defendants utilized approximately half of the maximum available Section 8 subsidies. (*Id.*) Thus, each development had approximately 80% market rate tenants and 20% lower income tenants. (*Id.*) The section 8 statute recognized the prudence of this 80/20 balance by expressly permitting HUD to "give preference to applications for assistance involving not more than 20 per centum of the dwelling units in a project." 42 U.S.C. § 1437f(c)(5); *Holbrook v. Pitt*, 643 F.2d 1261, 1272 n.20 (7th Cir. 1981).

While approximately half of the subsidies were not utilized at these six complexes, the total number of unused Section 8 units in IHDA's entire portfolio was much smaller, approximately 3.3% of the available Section 8 units. Moreover, the ability to utilize 40% of the Section 8 units gave the defendants the flexibility to meet potentially changing market, housing and economic conditions and ensure the economic success of the program. Indeed, in approximately August of 1983, IHDA and the owners, now equipped with several years of experience in this area, took advantage of this flexibility and increased the total utilization of available Section 8 subsidies.[1] Each of

[1] It is incorrect to assert, as plaintiffs do, that the defendants are only utilizing half of the available subsidies. (*See, e.g.*, Plaintiffs' Petition at 2.) In August of 1983, the owners and IHDA at-

(Footnote continued on following page)

these developments has remained financially sound and has allowed many low income families to live in economically mixed housing developments.

Plaintiffs are five individuals who inquired about the availability of low income housing at three of the six developments and Hope Fair Housing Center, an organization that assists lower income families in finding housing. They seek to require the defendants to use all of the available Section 8 subsidies. Only two of the plaintiffs actually filled out applications to rent apartments, both at the same development. None of the plaintiffs filled out applications at the other five developments and none of the plaintiffs inquired about housing at three of the developments. (App. at 3.)

On July 8, 1987, the Seventh Circuit affirmed the district court's entry of summary judgment on behalf of the defendants. (App. 1.) The court found that the defendants had not violated the Section 8 statute or regulations; that plaintiffs were not third-party beneficiaries under the Section 8 contracts and even if they were, the parties had modified their contractual obligations thereunder; and that the plaintiffs had no property interest in Section 8 benefits entitling them to due process. (*Id.*)

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[1] *continued*
tempted to transfer 90 Section 8 units that were authorized but not being utilized from five of the apartment complexes (18 from each complex) to the sixth complex. The five complexes would have then utilized 80% of the new maximum number of available Section 8 subsidies and the sixth complex would have become 100% Section 8 subsidized with full utilization. The net result of this proposal would have been that 416 of 482 Section 8 subsidies would be utilized. Although HUD ultimately disapproved the transfer, IHDA and the developers still retained the new increased utilization levels at each of the five complexes.

REASONS FOR DENYING THE WRIT

This case does not merit this Court's review. The Seventh Circuit's decision does not conflict with the decision of any other court and the court did not depart from the accepted and usual course of judicial proceedings. Supreme Court Rule 17.1. As is demonstrated below, none of the four issues for which plaintiffs seek review are sufficiently important to warrant this Court's review. *Id.* Rather, this case presents the relatively simple issue of whether defendants should have the discretion, in appropriate situations, to decide not to rent approximately 186 apartments to low income families to ensure that the developments in this case remain economically mixed and viable.

There are six specific reasons why the issues in this case are not sufficiently important to warrant this Court's review.

First, Congress has already addressed plaintiffs' grievance that all available Section 8 subsidies should be utilized. In 1981, Congress amended the Section 8 statute. to require full utilization for future projects. However, Congress expressly stated that this requirement was not to be applied retroactively, as plaintiffs in effect request. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 §§ 325, 371(b), 95 Stat. 357, 406, 431 (1981). Thus, Congress concluded that it was inappropriate to require the defendants to utilize all Section 8 subsidies when the defendants had not been required to do so in the past and had relied on that discretion in applying for funding.

While plaintiffs suggest that Congress always intended to require full utilization and merely clarified its original

intent in 1981, Congress' express denial of retroactive application of the statute demonstrates to the contrary. Moreover, as the Seventh Circuit observed, the "legislative history contains no suggestion that the purpose of the 1981 amendment was merely to clarify the original statute." (App. at 13.) Because Congress has already determined when full utilization is or is not required, this Court should not re-evaluate the balance Congress struck.

Second, Congress has abolished all funding for this program. Supplemental Appropriations Act of 1984, Pub. L. No. 98-181, Title II, § 209(a)(2), 97 Stat. 1153, 1183 (1984). Therefore this Court would be reviewing a statute and a program that Congress has repealed.

Third, while plaintiffs ask this Court to hear the merits of their entire claim, there is a significant standing hurdle which prohibits complete resolution of the dispute. Because none of the plaintiffs filled out applications at five of the developments, plaintiffs' standing to pursue claims against the owners of these developments "is doubtful." (App. at 3.) Little purpose would be served by this Court resolving in a piecemeal fashion a dispute over plaintiffs' alleged entitlement to no more than 30 apartments at one of six developments.

Fourth, plaintiffs assert that the Seventh Circuit's holding that plaintiffs have no due process claim conflicts with the Ninth Circuit's decision in *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982). This assertion is incorrect. As even plaintiffs acknowledge, in *Ressler*, plaintiffs were seeking a hearing before the owners could refuse to select a particular applicant as a tenant. (See Plaintiffs' Petition at 12.) There was no dispute regarding the number of subsidies that had to be utilized. Here, by contrast, plaintiffs seek to compel utilization of the actual bene-

fits, rather than a hearing to determine whether they are qualified for an apartment. Thus, plaintiffs claim a right to substantive relief, not procedural due process. Due process only provides procedural protection for property interests, not a right to substantive relief. *See generally Ferguson v. Skrupa*, 372 U.S. 726, 728-32 (1963). The Seventh Circuit's decision therefore does not conflict with *Ressler*.

Fifth, plaintiffs ask this Court to make the policy decisions on how to achieve the National Housing Act's goal of a "decent home . . . for every American family." 42 U.S.C. § 1441. But Congress has vested IHDA and HUD with the power and discretion to make these policy decisions for developments funded before the 1981 amendment. As the Eighth Circuit has observed:

> [S]uch lawsuits . . . require courts to determine both the objectives of national housing policy and the means appropriate for their realization. Housing policy is continuously evolving; its contours are better defined by those intimately involved in its development and implementation . . . [J]udicial supervision is not in keeping with the purposes underlying the Housing Act.

Cedar-Riverside Associates, Inc. v. City of Minneapolis, 606 F.2d 254, 258 (8th Cir. 1979).

The language of the Section 8 statute and the legislative history demonstrate that Congress intended to vest discretion in IHDA over the degree of utilization of Section 8 units in projects funded prior to the 1981 amendment. Congress chose "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. § 1437 (1976). *See* H.R. Rep. No. 1114, 93rd Cong., 2d Sess. 1, 22-24 (1974). As the Senate Report states: "Throughout Section

8, discretion in making important decisions . . . is given to the public housing agency . . ." S. Rep. No. 693, 93rd Cong., 2d Sess. 1, 44 (1974). There is no indication that Congress sought to exclude from this discretion the important administrative decision of setting utilization levels to provide, when appropriate, for economically mixed housing to assure the continued economic viability of Section 8 developments.

Sixth, the Seventh Circuit's decision denying plaintiffs' statutory, contractual and constitutional claims was correct. The 1981 amendment is fatal to plaintiffs' statutory claim. Plaintiffs' contractual claim fares no better. The plaintiffs are not parties to the Section 8 contracts and are not third-party beneficiaries thereunder. A third-party acquires enforceable rights under a contract only if the parties to the contract intended to confer a direct benefit upon that person. *See, e.g., Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981); Restatement (Second) of Contracts, § 302 (1979). The contracts at issue here were intended to benefit tenants, not applicants for housing. *Holbrook*, 643 F.2d at 1271-1272. As the Seventh Circuit stated:

> [T]o give each applicant . . . the status of a party to the contract would make almost every lower-income person in the United States a potential plaintiff. . . It is implausible that the developers, IHDA, or HUD, ever intended to impose so novel and ill-defined a burden on themselves. . .

(App. at 10.) Under plaintiffs' theory, the parties to the Section 8 contracts could not modify the contract terms, regardless of the circumstances, unless they first obtained a release from each of the hundreds of low income persons who had inquired about housing. (*See* App. at 11.) The law does not support this absurd conclusion.

Moreover, even if plaintiffs were third-party beneficiaries, the Section 8 contracts do not require full utilization. If they did, there would have been no need for Congress to have amended the statute in 1981 to provide that future contracts shall require full utilization. While plaintiffs argue that this means that defendants would not have to use any of the subsidies, the tax code requires that defendants rent at least 20% of all units to lower income families to retain the tax exempt status of the bonds that fund the developments. 26 U.S.C. § 103(b)(4)(A)(ii).[2] Thus, plaintiffs' fears of zero utilization have no basis in fact or in law. In any event, the Seventh Circuit found that the parties had modified any obligation to fully utilize the Section 8 subsidies that they may have had under the Section 8 contracts. (App. at 11 and cases cited therein.)

Because defendants did not violate the statute and plaintiffs have no contract rights, plaintiffs were not deprived of any property or entitlement without due process of law. (App. at 14.) Thus, plaintiffs' constitutional claim was properly denied.

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[2] This provision applies to the bonds at issue here. The Tax Reform Act of 1986 modified this provision without any substantive changes relevant here. *See* 26 U.S.C. § 142(d)(1)(A). The Tax Reform Act of 1986 generally applies to tax-exempt bonds issued after August 15, 1986. *See* Pub. L. No. 99-514, § 1311(a), 100 Stat. 2659 (1986).

CONCLUSION

For all the foregoing reasons, respondents A.D. Van Meter and James Kiley respectfully request that this Court deny plaintiffs' petition for certiorari.

Respectfully submitted,

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